No. 82-1435



# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1982

CONTRA COSTA THEATRE, INC., a corporation,
*Petitioner,*
vs.
CITY OF CONCORD, a municipal corporation,
REDEVELOPMENT AGENCY OF THE CITY OF CONCORD,
WILLIAM H. DIXON, RICHARD L. HOLMES, JUNE V. BULMAN,
LAURENCE B. AZEVEDO, RICHARD T. LA POINTE,
FARREL A. STEWART, RICHARD C. STOCKWELL,
PETER H. HIRANO, JAMES MURPHEY, EDWARD H. PHILLIPS,
GARY M. CAMPBELL, HAROLD OSTLING, HARRY L. YORK,
ROBERT T. BARKOFF, LYNNET A. KEIHL, DAVID STEELE,
ROBERT C. BINGHAM, JON Q. REYNOLDS, JR.,
MILTON D. REDFORD, DAVID A. BROWN,
DELTA BINGHAM JOINT VENTURE, a partnership,
REYNOLDS & BROWN, a partnership, and
DOES I through 100,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did the United States District Court for the Northern District of California and the Court of Appeals for the Ninth Circuit correctly conclude that under California law and the City of Concord municipal ordinances, Contra Costa Theatre, Inc. had no legitimate entitlement to a use permit for a proposed drive-in theatre which conflicted with existing City use plans?

2. Was there a rational basis for the City's denial of the use permit?

3. Is the petition appropriate in light of the now final state court decision entitled *Redevelopment Agency v. Contra Costa Theatre, Inc.*, 135 Cal.App.3d 73, 185 Cal.Rptr. 159 (1982), petition for hearing to California Supreme Court denied November 14, 1982?

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## BRIEF IN OPPOSITION

### OPINIONS BELOW

The orders of the Court of Appeal for the Ninth Circuit and the opinion of the District Court for the Northern District Court for the Northern District of California are identified in the Petition.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## STATEMENT OF THE CASE

Petitioner Contra Costa Theatre (CCT) is a drive-in theatre operator which until March of 1978 possessed a leasehold interest in a certain parcel of property located in the City of Concord, California (City). Respondents include the City, the City's Redevelopment Agency (Agency), individual members of the City Council and Agency, the City Manager and Assistant Manager, certain employees of the City's planning department and members of the planning commission. Also named are certain private individuals engaged in the redevelopment of the disputed parcel (Developers).

Until March of 1978, CCT operated a single-screen drive-in theatre on the disputed property. (Appendix B to Petition, p. 7) The property, which is located in the central business area of the City, is part of an older section of the City designated for redevelopment. As such, it was subject not only to the City's general plan and central area plan, but also the amended redevelopment plan. (Appendix B to Petition, p. 7)

In 1976, CCT applied for a permit to expand the intensity and scope of its operation to include two additional highly visible drive-in theatre screens. (Appendix B to Petition, p. 7) This proposed expansion conflicted not only with the City's general and central area plans, but also with the City's amended redevelopment plan. (Appendix B to Petition, p. 8; *Redevelopment Agency v. Contra Costa Theatre, Inc.*, 135 Cal.App.3d 73, 81-82, 185 Cal.Rptr. 159 (1982), hearing denied by California Supreme Court, November 14, 1982.)

On September 7, 1977, the City's planning commission held a hearing on CCT's application and denied it because, *inter alia,* it conflicted with the amended redevelopment plan, the general plan and the central area plan. *Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* 135 Cal. App.3d 74. The denial did not affect any existing use by CCT. Although the denial was subject to administrative appeal and the hearing was subject to state judicial review, CCT did not appeal or seek review. (Appendix B to Petition, p.8)

In accordance with its redevelopment plan, the Agency instituted an eminent domain action in Contra Costa County Superior Court on March 22, 1978, naming CCT as one of the defendants. By way of response to these proceedings, CCT appeared and sought damages and raised the same claims presented here, including the claim that the City and Agency conspired to deny its use permit application in order to depress the leasehold's market value prior to acquisition. *Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* 135 Cal.App.3d 73.

In the course of the trial of the state court action, the state court heard CCT's claim that the City and Agency had conspired to improperly depress the market value of its leasehold. The state court ruled against CCT on these issues. The state court also found that the planning commission had valid reasons for the denial of CCT's application, independent of the redevelopment reasons, and that CCT had failed to exhaust its administrative remedies. (Appendix B to Petition, p. 7; *Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* 135 Cal.App.3d 81-82.) Following entry of judgment in favor of the City on the

improper conduct charges, the issue of just compensation was tried to a jury and CCT was awarded $750,000.00 for its leasehold interest. (*Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* at 135 Cal.App.3d 85.)

On June 5, 1980, CCT appealed from the state court judgment. On September 5, 1980, CCT filed its present complaint in the United States District Court for the Northern District of California seeking damages equivalent to the difference between plaintiff's claim in the state action and the award in the state action.

On August 17, 1982, the California Court of Appeal affirmed the state court judgment, finding no evidence of improper conduct in the City's denial of the use permit. *Redevelopment Agency v. Contra Costa Theatre, Inc.,* 135 Cal.App.3d 73, 185 Cal.Rptr. 159 (1982). CCT's petition for hearing was denied by the California Supreme Court on November 14, 1982.

Petitioners federal action was dismissed by the U. S. District Court for the Northern District of California, Judge William Schwarzer presiding, on January 30, 1981. (Appendix B to Petition, p. 6) On September 28, 1982, the United States Court of Appeals for the Ninth Circuit affirmed the dismissal.

## ARGUMENT

CCT's petition should be denied. It presents no conflict of decision between the Circuit Courts nor any significant question of federal law. Most importantly, it is without merit.

Arguing that the District Court and Circuit Court too narrowly evaluated its claim of a property right, CCT

seeks to ensnare this Court in a review of state law and municipal ordinances and reevaluation of a municipal agency's discretionary administrative decision that was patently correct. Indeed, the propriety of that administrative decision and the present petition's lack of merit are demonstrated by a now final state court decision involving substantially identical claims regarding the denial of the disputed use permit.

## I

## THE DECISION BELOW WAS CORRECT—CCT HAD NO PROPERTY ENTITLEMENT UNDER THE APPLICABLE ORDINANCES AND PLANS

The decisions of the District Court and Circuit Court are patently correct. CCT had no entitlement under municipal or state law to expand the number of drive-in theatre screens in downtown Concord, a use which conflicted with the City and redevelopment plans.

CCT predicates its federal claim upon its assertion that it was deprived of a property right without due process of law. However, before a constitutionally cognizable property interest can arise, there must be more than a mere unilateral expectation. There must first exist under state law a legitimate entitlement to the benefit claimed. *Board of Regents v. Roth*, 408 U.S. 564, 569, 33 L.Ed.2d 548 (1972). There can be no doubt here that CCT had no legitimate entitlement to the disputed use permit under the applicable ordinances and use plans.

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of "interests that a person has *already acquired*" in specific benefits. *Board*

*of Regents v. Roth*, 408 U.S. 564, 576, 33 L.Ed.2d 548 (1972). There were no preexisting rights affected here. CCT did not operate multiple theatres at the time of the denial. CCT's existing operation of a single theatre was not affected by the denial. Rather, the denial did nothing more than leave the existing ordinances, planning restrictions and uses in effect. The granting or denying of a use or conditional use permit is discretionary and no due process rights are implicated by such a denial. *See, e.g., Regan v. Counsel of the City of San Mateo*, 42 Cal.App.2d 801, 806 (1941).

CCT's application was subject to the Concord Municipal Code. That ordinance gives the planning commission the widest possible discretion in making its decision. (Appendix B to Petition, p. 11) Under the City's ordinance, no public hearing is required. Concord's municipal code allows the Planning Commission to consider numerous factors and to deny an application if it finds it would be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City (Appendix B to Petition, p. 11). Of course, in this case, it is established that additional drive-in theatre screens in the downtown area would, *inter alia*, conflict with the area's redevelopment plan, a plan which is specifically designated to promote a public welfare.

It is well established that where, as here, the decisional authority is vested with broad discretion, no protected property right is created. *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed.2d 684 (1976) (no protected property right where no guarantee of continued employment); *Board of Regents v. Roth, supra*, at 408 U.S. 557; *Slocum v. Georgia State*

*Board of Pardons & Paroles*, 678 F.2d 940, 941 (11th Cir. 1982) (no legitimate claim of entitlement where state law merely established guidelines for consideration of parole) *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982) (applicant for discretionary firearm permit had no entitlement and no property right under applicable California laws); *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980) (applicant had no property interest in gaming permit where gaming commission's exercise of discretion need only have "reasonable" basis); *United Land Corp. of America v. Clarke*, 613 F.2d 497 (4th Cir. 1980) (property owner had no entitlement or right in land use permit where administrative decision subject to substantial discretion); *Mosher v. Beirne*, 357 F.2d 638, 641 (8th Cir. 1966) (no denial of due process where ordinance required permit to operate dance hall and vested decisional authority with broad discretion); *Keystone Cable-Vision Corp. v. FCC*, 464 F. Supp. 740, 744 (W.D. Pa. 1979) (no property right in already issued building permit subject to revocation). It is precisely this type of broad, discretionary authority which exists here and which defeats CCT's claim of an entitlement to the conflicting use.

CCT's claim fails not only because CCT had no legitimate entitlement to or property right in the disputed permit, but also because there is no plausible basis for disputing the denial. In order to state a claim for denial of due process, it is necessary to establish not only an invasion of a property interest, but also that the purported justification for the invasion was improper or at least disputable. *Rainbow Valley Citrus Corp. v. Federal Crop Insurance Corp.*,

506 F.2d 467 (9th Cir. 1974). In this case, the propriety of the denial is beyond dispute and CCT's claim must be rejected.

CCT's ancillary claim of a denial of equal protection is likewise without merit. As the District Court correctly noted, CCT makes no claim that use permits for drive-in theatres were issued to any other similarly situated owners in the redevelopment area nor that the permit denial involved any suspect classification or fundamental rights. Accordingly, the City's denial of CCT's use permit application must stand unless it is totally lacking a rational justification. *United Land Corp. v. Clarke, supra,* 613 F.2d at 500; *Fielder v. Cleland,* 433 F.Supp. 115, 118 (E.D. Mich. 1977), *affirmed,* 577 F.2d 740 (6th Cir. 1978). In the present case, there was undisputably a rational basis for the denial; the conflict of the proposed theatre expansion with the City's governing plans is established. *Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* 135 Cal.App. 3d 73.

## II

## CCT'S CLAIM IS UNSUPPORTABLE IN LIGHT OF THE STATE COURT DECISION

In this case, CCT asserts that it was improperly denied a use permit for expansion of a number of screens at its downtown drive-in theatre by reason of a precondemnation conspiracy on the part of the City to depress the leasehold's value. Those same claims were raised by CCT in the case of *Redevelopment Agency v. Contra Costa County Theatre, Inc.,* 135 Cal.App.3d 73, 185 Cal.Rptr. 159 (1982), and were rejected. The state court ruling is both dispositive of CCT's conspiracy claims and final.

In the state court action, as here, CCT sought damages equal to the alleged difference in market value between a single-screen and a multiple-screen theatre. *See, Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* 135 Cal.App.3d 77. In the state court action, as here, CCT claimed and sought to prove a conspiracy between the City and various private parties. *Id.* In the state court action, as here, CCT alleged that the City improperly heard and denied its application for a use permit in order to depress the market value of its property before condemnation. *Id.* The trial court in the state action heard and rejected those claims. In affirming that rejection, the California Court of Appeal stated at 135 Cal.App.3d 81-82:

> Here the evidence submitted to the trial court showed no more than a denial of appellant's application for a use permit because of a proposed use of the property inconsistent with the recently drafted City plans for the area. No conspiracy among city officials was established; no intent to diminish the value of appellant's leasehold interest was revealed by the evidence.

Since the state court ruling on the merits is now final, Petitioner's claim that it had an "entitlement" to such a permit or that there was any improper denial or conspiracy is necessarily moot. *Kremer v. Chemical Construction Corp.,* ..... U.S. ....., 72 L.Ed.2d 262 (1982), *reh. den.; Allen v. McCurry,* 449 U.S. 90, 66 L.Ed.2d 308 (1980).

Appellant's claim that it had an "entitlement" to construct additional drive-in theatre screens in a downtown area in contravention of the applicable municipal ordi-

nances and plans is unsupportable. Moreover, in light of the now final California Court of Appeal's decision, any claim relating to that decision or the propriety of the determination is now moot. CCT's petition for hearing should be denied.

Dated: March 25, 1983.

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